IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BUDIMIR DAMNJANOVIC and
DESANKA DAMNJANOVIC,

Plaintiffs,

v.

CIVIL NO. 4:14-cv-11920
HON. LINDA V. PARKER
MAG. J. MONA K. MAJZOUB

UNITED STATES DEPARTMENT OF THE AIR FORCE, SECRETARY DEBORAH LEE JAMES, *in her official capacity*, UNITED STATES DEPARTMENT OF DEFENSE, SECRETARY CHARLES T. HAGEL, *in his official capacity*, and UNITED STATES OF AMERICA.

Defendants.
_________________________________/

DEFENDANTS' REPLY BRIEF TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

For the reasons set forth below, none of the contentions the Damnjanovics have raised in opposition to Defendants' motion to dismiss have any merit, and the Court should accordingly enter an order dismissing this action.

I. Claim for compensation under 35 U.S.C. § 183.

The Damnjanovics have not provided any persuasive argument showing that they stated a plausible claim for compensation under 35 U.S.C. § 183. Just as in their Complaint, the Damnjanovics have again neither mentioned the Air Force's determination that it has not used their invention nor provided any basis to refute that determination. *See* Pls.' Resp. at 10-13. This undisputed fact alone is fatal to their request for compensation "for the use of the invention by the Government." 35 U.S.C. § 183. Nevertheless, the Damnjanovics persist with this portion of their claim, arguing that the term "use" is not defined by the statute, and that it encompasses using the invention solely by preventing others from using it. *See* Pls.' Resp. at 12. The Court should find this argument wholly unpersuasive because the Damnjanovics have not cited to any controlling or persuasive authority for such an interpretation of governmental "use" of the invention, and, as explained in Defendants' motion to dismiss, their interpretation amounts to nothing more than a restatement of the secrecy order's purpose under the guise of calling it governmental use. *See* Defs.' Mot. to Dismiss at 8-9; 35 U.S.C. § 181.

Moreover, such as expansive reading of the statute would mean that every secrecy order imposed by the Government would result in the "use" of the underlying invention for purposes of 35 U.S.C. § 183, thereby rendering the Government liable to compensate every single patent applicant whose application is subjected to a secrecy order. The statutory language of 35 U.S.C. § 183 clearly shows that such a result is not intended. In particular, a claimant is expressly required to show "damage caused by the order of secrecy and/or for the use of the invention by the Government" prior to obtaining compensation, *see* 35 U.S.C.

§ 183, and allowing compensation based on the imposition of the secrecy order itself would render superfluous those express requirements. *See Nat'l Air Traffic Controllers Ass'n v. Secretary of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) ("We must 'giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'").

Regarding their claim for damages caused by the secrecy order's imposition, the Damnjanovics mischaracterize Defendants' argument by claiming that Defendants are improperly asking them to assign a "sum certain" to their damages. *Cf. Linick v. United States*, 96 Fed. Cl. 78, 80-82 (2011) (holding that 35 U.S.C. § 183 does not require sum certain to pursue compensation claim). Defendants are not improperly mandating a "sum certain" be shown, but rather are asserting that the Damnjanovics have failed to allege any actual, concrete harm or specific injury suffered as the result of the secrecy order. *See Lear Siegler, Inc. v. United States*, 225 Ct. Cl. 663, 667 (1981). As explained in Defendant's motion to dismiss, the Damnjanovics' claim of lost profits resulting from the secrecy order's interference with their potential business opportunities, *see* Pls.' Resp. at 10-11, is a purely speculative claim. *See* Defs.' Mot. To Dismiss at 10-13. Instead of attempting to refute the speculative nature of their alleged harms, the Damnjanovics have mischaracterized Defendants' arguments as requiring them to take actions that would have either violated the secrecy order's prohibitions or invalidated their patent under the on sale bar of 35 U.S.C. § 102(a)(1). *See* Pls.' Resp. at 11, 13. The Court should therefore find these misleading arguments lacking in merit.[1]

II. Unjust enrichment claim.

The Damnjanovics' only support for claiming that the Federal Tort Claims Act ("FTCA") provides the Court with jurisdiction to address their unjust enrichment claim is a passing reference in *Foster v. Pitney Bowes Corp.*, 549 F. App'x 982, 985 (Fed. Cir. 2013), describing unjust enrichment as a "tortious act." *See* Pls.' Resp. at 13. Such a passing reference is far from sufficient to undermine Defendants' argument to the contrary, which is soundly based on: (1) Michigan state case law explaining that unjust enrichment is an equitable remedy based on an implied contract; and (2) persuasive decisions from other federal courts specifically holding that the FTCA does not permit a claim for unjust enrichment because it is not a tort. *See* Defs.' Mot. to Dismiss at 15-16. In addition, there is no merit to the Damnjanovics' argument that they satisfied the FTCA's exhaustion requirement and statute of limitations, because their argument fails to recognize that the administrative claim they filed with the Air Force only sought

[1] The *McDonnell Douglas Corp. v. United States*, 229 Ct. Cl. 323 (1982), decision lends no support for the Damnjanovics' arguments, as that case involved factual and procedural circumstances fundamentally different from those of the Damnjanovics, and as the court did not address the issue presented here of what type of damages are sufficient to state a plausible § 183 claim.

compensation under 35 U.S.C. § 183, and did not separately raise a claim for unjust enrichment, so as to put the Air Force on notice of that additional claim.[2] *See* Pls.' Resp. at 14; Defs.' Mot. to Dismiss at 15 n.6.

III. Takings claim.

Regardless of whether it is viewed as a separate claim for compensation or an alternate claim for declaratory relief, *see* Pls. Resp. at 14-15, the Damnjanovics have failed to state a plausible violation of the takings clause of the Fifth Amendment. *See* Defs. Mot. to Dismiss at 17-22. The Invention Secrecy Act provides the exclusive method for obtaining compensation for any taking of private property that occurred during the pendency of a secrecy order, and, contrary to the Damnjanovics' contentions, those procedures are constitutionally sufficient. *See Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982); *Hornback v. United States*, 62 Fed. Cl. 1, 3 (2004); *Constant v. United States*, 16 Cl. Ct. 629, 632 (1989). Moreover, as Defendants' motion explained, the Damnjanovics' takings claim alternatively fails because their Complaint did not set forth any facts showing a governmental taking of private property. *See* Defs.' Mot. to Dismiss at 19-22. The Damnjanovics seemingly challenge that argument by stating the imposition of a secrecy order alone constitutes a takings, and that they have a "property right" in their "First Amendment right to market/sell their invention." *See* Pls.' Resp. at 16. The Court should reject these arguments, however, because they are perfunctory and not supported by any legal authority. *Cf. Sadler v. Comm'r of Soc. Sec.*, 2014 WL 4724767, *5 (E.D. Mich. Sept. 23, 2014) ("[A]rguments not raised and supported in more than a perfunctory manner may be deemed waived.").

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[2] The Damnjanovics have failed to challenge, and thus waived opposition to, Defendants' argument that the Court lacks jurisdiction over their unjust enrichment claim under the Little Tucker Act. *See Design Basics, LLC v. Chelsea Lumber Co.*, 977 F. Supp. 2d 714, 736 (E.D. Mich. 2013) (stating that party waives opposition to a motion when it fails to respond to arguments raised in the motion).

IV. Free Speech claim.

Because the secrecy order is no longer in place, there is no live controversy as to whether the U.S. Government is restricting the Damnjanovics' free speech rights. *See* Defs. Mot. to Dismiss at 22-23. Any judicial act declaring the Invention Secrecy Act a violation of the First Amendment, without the existence of such a live controversy, would be advisory and thus beyond the constitutional authority of this Court. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) ("Article III of the Constitution confines the power of the federal courts to adjudication of 'cases' or 'controversies.'"); *see also Yuan Gao v. Gonzales*, 464 F.3d 728, 730 (7th Cir. 2006) ("Any judicial act while there is no outstanding order of removal would be advisory."). Therefore, the Court should dismiss this claim as moot.

V. APA claim.

The Damnjanovics' concession that 35 U.S.C. § 188 merely provides Defendants with the "option" to promulgate rules and regulations should alone foreclose their APA claim. *See* Pls.' Resp. at 18. In any event, the crux of their argument appears to be based on their mistaken belief that Defendants have not complied with the procedures set forth in 35 U.S.C. § 183. *See* Pls. Resp. at 17. This is simply not true – the U.S. Government has complied with 35 U.S.C. § 183 in the Damnjanovics' case, as the Air Force adjudicated their administrative claim in a timely manner and the Damnjanovics have now freely exercised their right to raise their claim *de novo* before this Court. *See Linick*, 96 Fed. Cl. at 82.

For all the foregoing reasons and those previously stated in Defendants' motion to dismiss, the Court should dismiss the Damnjanovics' Complaint.

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

JOHN FARGO
Director

s/ Craig A. Newell, Jr.
CRAIG A. NEWELL, JR.
Trial Attorney
Department of Justice, Civil Division
Washington, DC 20530
(202) 616-8116
Craig.Newell@usdoj.gov
Attorneys for Defendants

Local Counsel:
BARBARA L. McQUADE
United States Attorney

THERESA M. URBANIC
Assistant U.S. Attorney
211 W. Fort Street
Suite 2001
Detroit, MI 48226-3211

Dated: October 20, 2014

CERTIFICATION OF SERVICE

I hereby certify that on **October 20, 2014**, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Craig A. Newell, Jr.
CRAIG A. NEWELL, JR.
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, DC 20530
(202) 616-8116
Craig.Newell@usdoj.gov